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No. 10-660

In the Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION, L.L.C.,
PETITIONER

v.

FOX NEWS NETWORK, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Exemption 4 of the Freedom of Information Act authorizes the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). In this case, the Board of Governors of the Federal Reserve System (Board) withheld the names, loan amounts, and loan dates of individual borrowers that requested loans from the discount window and Federal Reserve emergency lending facilities after concluding that release of such information would harm the competitive position of the borrowers and would impair the Board's future ability to maintain stability in financial markets. The questions presented are as follows:

1. Whether the court of appeals erred in holding that the information at issue was not "obtained from a person" within the meaning of Exemption 4 because the information resulted from the agency's own executive actions in granting the loans and thus was not obtained from the borrowers.

2. Whether the court of appeals erred in holding that the fact that disclosure of the information would harm the agency's ability to carry out its functions does not make the information "confidential" within the meaning of Exemption 4.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A16) is reported at 601 F.3d 158. The opinion and order of the district court (Pet. App. A17-A51) is reported at 639 F. Supp. 2d 384.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2010. A timely petition for rehearing was denied on August 20, 2010 (Pet. App. A5-A6). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Reserve Act, 12 U.S.C. 221 *et seq.*, provides that the Board of Governors of the Federal Reserve System (Board), along with the Federal Open Market Committee, "shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. 225a. The Federal Reserve Act vests lending authority in the regional Federal Reserve Banks and the power to authorize and supervise lending in the Board. 12 U.S.C. 347b(a); see also 12 U.S.C. 301, 248(j), 343.

The discount window is a permanent lending program through which the twelve regional Federal Reserve Banks, subject to Board regulation and supervision, lend funds on a secured, short-term basis to eligible depository institutions in their districts. C.A. App. A127-A128. In response to the recent financial crisis, the Board authorized the Reserve Banks to initiate a number of additional, temporary special credit and liquidity facilities to relieve severe liquidity strains on the market and reduce risks to financial stability. Specifically, in the latter part of 2007, the Board authorized the Reserve Banks, under Section 10B of the Federal Reserve Act, 12 U.S.C. 347b(a), to establish the Term Auction Facility, which provided longer than overnight funding to depository institutions with interest rates determined at auction. In early 2008, as financial market conditions continued to deteriorate, the Board authorized the Reserve Banks, under the emergency authority of Section 13(3) of the Federal Reserve Act, 12 U.S.C. 343, to initiate programs, including: the Primary

Dealer Credit Facility, under which the Federal Reserve Bank of New York made overnight funds available to "primary dealers"[1] that are not eligible to borrow at the discount window, and the Term Securities Lending Facility, which provided for 28-day loans of Treasury securities. C.A. App. A129-A131.

In the past, the Board and the Federal Reserve Banks have released extensive public information about lending made under such programs, including the terms of loans, eligibility requirements, current and historical lending data, and types and value of collateral accepted. C.A. App. A136. That information, however, generally has been released in the aggregate for each Federal Reserve district and facility and has not been broken down by borrower or by specific loan. Thus, historically speaking, neither the Board nor the Reserve Banks have disclosed information regarding individual loans, such as the names of individual borrowers, or the amounts, dates, or specific collateral pledged for specific loans. *Id.* at A137.

The Board views such information as sensitive and confidential because Reserve Banks act as "lenders of last resort" to depository institutions and primary dealers unable to secure funding from market sources on a short-term basis. C.A. App. A97, A103. Although healthy financial institutions also borrow from Reserve Banks for ordinary operational reasons, and to obtain liquidity in markets that are temporarily closed to participants, the Reserve Banks' role as lenders of last resort to institutions unable to secure short-term funds in

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[1] Primary dealers are designated banks and securities brokers with which the Federal Reserve Bank of New York trades U.S. government securities as counterparties in executing open market operations. C.A. App. A100.

the market results in a stigma associated with borrowing from them. *Id.* at A137-A138. That stigma can cause significant competitive injury to financial institutions should information regarding individual loans become public. *Ibid.* Moreover, the Board has concluded that if depository institutions and primary dealers were unwilling to come to the Reserve Banks for their funding needs, particularly in times of economic crisis, the Board's ability to administer lending programs crucial to maintaining national financial and economic stability would be severely undermined. *Id.* at A143-A146.

2. On November 10, 2008, Fox News Network, LLC (a respondent in this Court) filed a request with the Board under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, seeking "the names of institutions receiving Federal Reserve lending" from eleven named programs and "any other Federal Reserve lending facility," as well as "an accounting of the collateral provided by these institutions in exchange for the lending" from August 8, 2007 to November 17, 2008. C.A. App. A169-A171. A subsequent request sought, for the months of September and October 2008, "records sufficient to identify all institutions that have participated in any Fed lending program," records sufficient to identify "all collateral pledged" by each such institution, and "the amount borrowed or advanced to the institution." *Id.* at A172-A172.1.

After providing several responsive records, the Board withheld approximately 6187 pages of Remaining Term Reports (Reports) responsive to the request. The Reports are prepared by the staff of the Board's Division of Monetary Affairs using raw data provided by each Reserve Bank. The Reports show outstanding extensions of credit under the discount window and emer-

gency lending programs. C.A. App. A134, A155-A156. The Reports also contain names of borrowers that requested loans, the originating Reserve Bank District, individual loan amounts, the type of lending program borrowed from, and loan origination and maturity dates. *Ibid.*

The Board withheld the Reports under FOIA Exemption 4, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4).[2] The Board explained that disclosure of the Reports would reveal the identities of the institutions that sought funds from the Reserve Banks under "last resort" lending programs, and thus would likely cause substantial competitive injury to those institutions that provided the information at issue to the Reserve Banks. C.A. App. A179-A181. In addition, the Board explained that the future reluctance of institutions to participate in such lending programs would impair the Board's ability to carry out statutory functions in a time of economic crisis. *Ibid.*

3. In response, Fox News filed this FOIA action in federal district court. The district court granted summary judgment for the Board, holding that the Reports may be withheld under FOIA Exemption 4. Pet. App. A17-A51. The court concluded that the information at issue was "obtained from a person," reasoning that "the borrower's name, the amount it must borrow, and the

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[2] The Board also invoked FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Because the Board did not rely on Exemption 5 after the district court proceedings, this brief does not discuss it further.

property it volunteers to provide as collateral is information that originated with the borrower and is reflected in the data Fox seeks." *Id.* at A42-A46. The court further concluded the information is "privileged or confidential" within the meaning of Exemption 4 because the Board "show[ed] specific and substantial harms to borrowers if the information about [d]iscount [w]indow loans were disclosed." *Id.* at A47-A48. In the alternative, the court held that the information was "privileged or confidential" under a "program effectiveness" test because disclosure "would compromise the Board's effective execution of its statutory responsibilities." *Id.* at A48-A50.

4. The court of appeals vacated and remanded, adopting the holding in *Bloomberg, L.P.* v. *Board of Governors*, 601 F.3d 143 (2d Cir. 2010) (*Bloomberg*), petition for cert. pending, No. 10-543 (filed Oct. 26, 2010), a companion case decided the same day and that involved FOIA requests for much of the same information at issue here. Pet. App. A7-A16. In *Bloomberg*, the court of appeals first held that the individual loan information was not "obtained from a person" (*i.e.*, the borrowing institutions) as required by Exemption 4. 10-543 Pet. App. 8a-9a. The court acknowledged that a loan application would be "obtained from a person," but reasoned that "Bloomberg's FOIA request does not seek loan applications; it seeks documents that show what loans the Federal Reserve Banks actually made." *Ibid.* The court of appeals stated that "what is requested is not merely the information collected and slightly reprocessed by the government, but disclosure of the agency's own executive actions." *Id.* at 10a. The court explained that "even if the loans were granted automatically, they did not come into existence until the Federal Reserve

Bank took executive action by granting the loan. The only information sought is a summary report of actions that were taken by the government. And it cannot be said that the government 'obtained' information as to its own acts and doings from external sources or persons." *Id.* at 12a.

The court of appeals in *Bloomberg* also rejected the Board's alternative argument that the information on individual borrowers was protected under Exemption 4 because it was confidential commercial information obtained by the Board from the Reserve Banks. The court declined to decide whether the individual Reserve Banks that submitted the information to the Board are "persons" for purposes of Exemption 4. *Bloomberg*, 10-543 Pet. App. 12a n.2. Rather, the court held that the information was not "confidential." The court explained that information is confidential for purposes of Exemption 4 if its disclosure would have the effect of harming "the competitive position of the person from whom the information was obtained." *Id.* at 13a (quoting *Inner City Press/Cmty. on the Move* v. *Board of Governors*, 463 F.3d 239, 244 (2d Cir. 2006)). The court concluded that because the Board did not allege that the relevant "person" in this instance—the Reserve Bank itself—suffered any competitive harm, the information could not be deemed "confidential" under that test. *Ibid.*

The court of appeals in *Bloomberg* then declined to "extend" the scope of Exemption 4's "confidential" requirement to cover information that, if disclosed, would harm the Board's ability to carry out its mission or undermine program effectiveness. *Bloomberg*, 10-543 Pet. App. 13a-14a. The court held that the "program effectiveness" test, previously endorsed by the First and D.C. Circuits, "would give impermissible deference to

the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in the context of Exemption Five." *Id.* at 14a (citing *Federal Open Mkt. Comm. of the Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 354 (1979)).

5. On May 3, 2010, the Board filed a petition for rehearing en banc. The petition challenged the panel's holding that the information at issue was not "obtained from a person," as well as its holding that a "program effectiveness" test for confidentiality is not cognizable under Exemption 4. The court of appeals denied the petition on August 20, 2010. Pet. App. A5-A6.

6. On July 21, 2010, while the petitions for rehearing were pending in this case and *Blomberg*, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, became law. The Dodd-Frank Act required the release of some of the information that had been withheld by the Board pursuant to Exemption 4 and also established prospective standards governing the disclosure (after specified intervals) of loan-related information of the type at issue in this case.

a. Section 1109(c) of the Dodd-Frank Act required the Board to "publish on its website, not later than December 1, 2010," certain information concerning emergency lending facilities authorized by Section 13(3) of the Federal Reserve Act from December 1, 2007 through July 21, 2010. § 1109(c), 124 Stat. 2129. Those facilities include three of the facilities at issue in this case: the Term Auction Facility, the Primary Dealer Credit Facility, and the Term Securities Lending Facility (see pp. 2-3, *supra*). Under the Act, the Board must disclose: (1) the names of recipients of assistance; (2) the type of assistance provided; (3) the value or amount

of assistance; (4) the dates; and (5) the specific terms of any repayment expected, including interest rate and collateral. § 1109(c)(1)-(5), 124 Stat. 2129. Consistent with its obligation under the Act, the Board disclosed that information on December 1, 2010. As a result of the Board's recent disclosure, the part of the FOIA request pertaining to the emergency lending facilities has been rendered moot. The only information remaining at issue in this case concerns lending from the discount window.

b. Section 1103 of the Dodd-Frank Act establishes prospective standards for the protection and subsequent release of information concerning lending under both the discount window and emergency lending programs. Those prospective standards apply to "information concerning the borrowers and counterparties participating in emergency credit facilities, discount window lending programs, and open market operations authorized or conducted by the Board or a Federal reserve bank." § 1103(b), 124 Stat. 2118. For transactions executed after its effective date (July 21, 2010), the Act sets a schedule of delayed disclosure of (1) "the names and identifying details of each borrower, participant, or counterparty"; (2) "the amount borrowed"; (3) "the interest rate or discount paid"; and (4) "information identifying the types and amounts of collateral pledged." *Ibid.*

The Dodd-Frank Act does not, however, require immediate release of such information. For emergency lending facilities created under Section 13(3) of the Federal Reserve Act, the information must be released one year after the effective date of termination of the authorization of the facility. § 1103(b), 124 Stat. 2118. With respect to discount window and open market operations, the information must be released by "the last day of the

eighth calendar quarter following the calendar quarter in which the covered transaction was conducted." *Ibid.* The Chairman of the Board may publicly release this information earlier if he determines that such disclosure would be in the public interest and would not harm the effectiveness of the relevant credit facility. § 1103(b), 124 Stat. 2118-2119. For all of the loans subject to this section, the information "shall be confidential," including for purposes of FOIA, until the mandatory release date (unless the Chairman determines to release it earlier). § 1103(b), 124 Stat. 2119.

As noted above, the new standards set forth in Section 1103 operate only on a prospective basis. Section 1103(b) provides that "[n]othing in this section is meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of enactment [of the Act]." 124 Stat. 2120.

7. On November 16, 2010, the court of appeals granted petitioner's motion to intervene in this case and to stay the mandate pending the filing and disposition of a petition for a writ of certiorari. Pet. App. A1-A2.

ARGUMENT

The instant petition raises the same questions presented by the pending petition for certiorari in *The Clearing House Ass'n* v. *Bloomberg, L.P.*, No. 10-543. As noted above (p. 6, *supra*), the court of appeals in this case adopted the reasoning and holding of its decision in *Bloomberg*, which addresses much of the same information at issue here. For the reasons explained in our brief in opposition (at 10-18) to the petition for a writ of certiorari in *Bloomberg* (concurrently filed with this brief), further review is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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